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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In Re:

IRENE MICHELLE SCHWARTZ-
TALLARD

Debtor.

BK-S-07-11730 LBR

Date: January 7, 2010

Time: 1:30 p.m.

Chapter 13

PRE-TRIAL BRIEF

COMES NOW, HSBC BANK USA and AMERICA'S SERVICING COMPANY by and
through counsel and files this Pre-Trial Brief stating as follows:

I. UNDISPUTED FACTS:

HSBC BANK USA held a security interest in the form of a Note and Deed of Trust encumbering
17 Caprington Road, Henderson Nevada 89052, which loan was serviced by AMERICA'S SERVICING
COMPANY, with the Debtor as the Trustor/Borrower. (Hereinafter "Secured Creditor").

Secured Creditor directed counsel to file a Motion for Relief asserting that the Debtor was post
petition delinquent which motion was filed on or about February 27, 2009. No opposition was filed by

1 the Debtor or the Chapter 13 Trustee resulting in the motion being granted at the hearing on March 25,
2 2009.

3 Secured Creditor's counsel prepared and submitted an order vacating the automatic stay which
4 was docketed on April 6, 2009.

5 Debtor's prior counsel subsequently filed a Motion to Reinstate the Automatic Stay which was
6 heard on May 13, 2009. The motion was granted but said counsel did not promptly prepare, submit, or
7 enter an order. The recorded transcript from the hearing also makes it clear that moving counsel did not
8 ask the Court for an "immediate", "standing", "speaking", or "bench" order.

9
10 Secured Creditor held a foreclosure sale of the Debtor's residence on May 20, 2009. As of
11 January 4, 2010, Debtor has not made any efforts to return title of the property to her.

12 On June 1, 2009, Debtor's prior counsel sent a letter asserting that the automatic stay had been
13 violated (despite the fact an order had not been entered) and threatened a motion for sanctions.

14 Debtor's prior counsel submitted an order reinstating the stay which was signed and docketed on
15 June 3, 2009. The order does not contain any retroactive language or relief.

16 On June 4, 2009, Secured Creditor's counsel sent a response letter acknowledging that a stay was
17 in effect as of June 3, 2009, that no further eviction proceedings would occur, and that a motion for
18 sanctions was not warranted. Debtor's prior counsel proceeded with a motion for sanctions nonetheless.

19 On June 17, 2009, this Court heard Debtor's emergency motion for sanctions and set the matter
20 for an evidentiary hearing. The Debtor was present at the hearing and the Court will recall that it:

- 21
22 -Admonished Debtor's prior counsel for the delay in submitting an order reinstating the stay,
23 -Asked him if at the reinstatement hearing the Court labeled the order as "immediate".
(which he quickly asserted was the case),
24 -Urged him to obtain and listen to a recording of the hearing. and
25 -Reminded him that the Court could not set aside the foreclosure sale or award damages for
26 an alleged wrongful foreclosure without the filing of an adversary proceeding.

1 The Court also asked undersigned counsel to put in writing his protocol on motions to reinstate
2 the automatic stay and have a witness attend to testify of the payment history.

3 4 **II. ISSUES**

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6 As discussed throughout this brief, the two narrow issues before this Court are; 1) When was the
7 automatic stay was reinstated?, and 2) if the foreclosure sale violated an automatic stay? The Court
8 should not allow the Debtor to muddy the waters or the limited issues before it. The Debtor is limited to
9 the relief requested in its motion for sanctions and alleged violation of 11 USC 362.

10 **III. LAW AND ARGUMENT**

11 **a. The Order Reinstating the Stay should be construed as effective upon entry**

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13 With rare exceptions, orders are only effective upon being written, signed, and entered upon the
14 docket. The Bankruptcy Appellate Panel of the Ninth Circuit has discussed the proper rationale behind
15 this approach in two major cases discussed below. There seem to be no cases addressing such an issue
16 by the Ninth Circuit.

17 The first case is almost directly on point to this instant Debtor's situation. It involves the
18 foreclosure sale of a home after certain debtors obtained a "signed" order reinstating the stay but before
19 the order was "entered" on the docket.

20 The debtors in In re Sewell, 345 B.R. 174 (9th Cir. BAP), had their chapter 13 case dismissed for
21 failure to file certain documents with the court. The documents were later procured and the debtors filed
22 a motion to reinstate their case. A foreclosure sale took place "after" the order reinstating the case was
23 "signed" but before the order was "entered" on docket. Debtors then moved to set aside the foreclosure
24 sale.
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1 Bankruptcy Chief Judge Baum, of the District of Arizona, ruled that the order became effective
2 upon “docketing” and denied the debtors’ motion to set aside the sale. The Ninth Circuit Bankruptcy
3 Panel later affirmed his decision.

4 The court in Sewell ruled:

5 The Reinstatement Order did “set aside” the dismissal but this may imply only
6 prospective relief. To vacate all of the effects of a dismissal order retroactively could
7 have far ranging, unintended consequences. *See In re Aheong*, 276 B.R. 233, 243 n. 10
8 (9th Cir. BAP 2002). The Reinstatement Order says nothing about retroactively imposing
9 the automatic stay and doing so would void not only the foreclosure sale but possibly
10 other events that we and the bankruptcy court know nothing about. We decline to read the
11 Reinstatement Order so broadly and, like the court in *In re Brown*, 290 B.R. 415, 422
12 (*Bankr.M.D.Fla.2003*), we do not “find any reason to deviate from the well-accepted rule
that orders are effective when written and docketed.” *See also Beatty*, 162 B.R. at 857-58
(oral ruling was not effective to convert case, partly because “the rules consistently rely
upon the entry of the judgment or order as the effective date for the consequences of the
judgment or order”).

12 Id. at 180.

13 The court also recognized that:

14 Although not raised by the parties, the court also doubts the constitutional validity of a
15 finding that the order was effective when signed where the [a]ffected parties lacked any
16 notice or knowledge thereof and lacked any way to find such order in the public record:
such result seems to lack fundamental due process of law.

17 Id. at 177. This comment was made about an order that had been “signed” by a court but not “entered”
18 on the docket. Punishing the instant Secured Creditor for allegedly violating an order that was *not even*
19 *reduced to writing* clearly lacks any fundamental due process of law.

20 The reference to *In re Beatty*, 162 B.R. 853 (9th Cir. 1994) provides further discussion on the
21 reasoning behind an order’s effective date being its entry on the docket.

22 Various rules of procedure recognize that the effective and operative date of an order is
23 the date of entry into the docket. For example, Fed.R.Bankr.P. 9021 and Fed.R.Civ.P. 58
24 provide that a judgment (which is defined by Fed.R.Bankr.P. 9001(7) and 9002(5) to
25 mean any appealable order) is effective upon entry on the docket. The time for filing a
26 notice of appeal under Fed.R.Bankr.P. 8002(a) or a motion for a new trial under
Fed.R.Bankr.P. 9023 and Fed.R.Civ.P. 59 commences upon the entry of an order. Under
Fed.R.Civ.P. 62(a), as made applicable by Fed.R.Bankr.P. 7062 and 9014, the entry of a

1 judgment or order triggers the right to execute upon or enforce that judgment or order.
2 Given that the rules consistently rely upon the entry of the judgment or order as the
3 effective date for the consequences of the judgment or order, we decline to decide that
conversion is effective upon oral ruling for purposes of determining whether a debtor
retains his or her right to dismiss a Chapter 13 case.

4 Id. at 857-858. (In re Beatty was overturned by In re Rossom, 543 F.3d 764 (9th Cir. 2008) for reasons
5 other than those cited above).

6 Undersigned counsel believes that it has been this Court's long standing protocol that unless it
7 specifically designates on the record that it is an "immediate", "standing", "speaking", or "bench" order.
8 such an order is not effective until it is reduced to writing and entered on the docket.

9 The protocol of undersigned counsel in handling motions to reinstate incorporates the above.
10 When a motion to reinstate is received by undersigned counsel, it is immediately forwarded to the client
11 with a request for direction on whether or not the client wishes to oppose the motion. Further, if
12 undersigned counsel is later notified that a judge has made an "immediate", "standing", "speaking", or
13 "bench" order, (regardless of whether or not the client has directed counsel to oppose), counsel
14 immediately notifies the client in writing, as well as the trustee conducting any foreclosure sale if
15 known, of the Court's ruling and directs it not to proceed.

16 Finally, if undersigned counsel receives a copy of an order reinstating the stay, (regardless of
17 whether or not the client has directed counsel to oppose), counsel immediately forwards the order to the
18 client, as well as the trustee conducting any foreclosure sale if known, and directs it not to proceed to
19 sale.

20 Counsel asserts that this protocol properly follows this Court's direction as well as the
21 controlling law cited above. It is unfortunate what has happened to this Debtor and counsel does not
22 diminish or discount what has happened but strongly asserts that Secured Creditor did nothing wrong
23 and properly proceeded. There is no evidence before this Court, and it is ridiculous to believe, that this
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1 Debtor was somehow singled out for improper treatment or that a lender lays in wait to foreclose on a
2 home using trickery. Especially in this economic climate.

3 **b. There has been no violation of the stay warranting damages under 11 USC 362(k)(1)**

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5 Debtor's moving papers mistakenly assert damages under 11 USC 362(h) which has been
6 replaced by 11 USC 362(k)(1). This statute requires that a creditor which violates the automatic stay
7 reimburse a debtor for "actual" damages.

8 Secured Creditor asserts that it did not violate any automatic stay because none existed when the
9 foreclosure sale was conducted. However, in the event this Court finds differently, the *actual* damages
10 should be limited to that narrow window of time between June 1, 2009, when the Debtor first believed
11 the stay had been violated, and June 4, 2009 when undersigned counsel acknowledged the reinstatement
12 of the stay. In any event, the actual damages should go no further than the June 17, 2009, when the
13 Court assured the Debtor that she was safe to remain in the home pending a decision of your Honor.

14 Additionally, the Court made it clear at the June 17, 2009, hearing that the Debtor could only
15 seek to restore title to the home, and alleged damages from a wrongful foreclosure, in the context of an
16 adversary proceeding. Seeking such remedies or damages at this juncture is not procedurally correct.

17
18 In order to prevail for any award of damages, the Debtor must prove by clear evidence that
19 Secured Creditor "knew of the automatic stay and that [its] ... actions which violated the stay were
20 intentional." In re Bloom, 875 F.2d 224, 227 (9th Cir. 1989). There is no evidence of any such
21 knowledge before this Court or that the sale of the property was intentionally done with knowledge of
22 the automatic stay being reinstated.

23 Allegations that the Debtor was current, or that the motion for relief was improper, which the
24 Secured Creditor fervently disputes, are not relevant issues and are not the proper test in determining a
25 violation of the automatic stay under 11 USC 362(k)(1). It is ridiculous to assert that a creditor violates
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1 the automatic stay when it approaches a court of law, alleging that a debtor is delinquent, and seeks
2 relief from the stay by a properly noticed motion. Especially when a debtor does not even file an
3 opposition to the motion!

4 Further, Secured Creditor is not sure if the Debtor is seeking emotional damages but if she is,
5 such an award should only be granted in unusual circumstances for which this situation does not apply.
6 It is clear that had Debtor's *first* counsel filed an opposition to the motion for relief, or had her *second*
7 counsel sought an "immediate" order reinstating the stay or promptly entered a written order after the
8 stay was reinstated, the parties would not be before this Court under these circumstances. The Debtor
9 cannot lay this at Secured Creditor's feet.
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11 To warrant an award of "emotional damages", a debtor must "1) suffer significant harm, (2)
12 clearly establish the significant harm, and (3) demonstrate a causal connection between that significant
13 harm and the violation of the automatic stay" In re Dawson, 390 F.3d 1139 (9th Cir. 2004). "Fleeting or
14 trivial anxiety or distress" that is medically insignificant does not support an award of emotional
15 damages. *Id.* at 1149.

16 Likewise, Secured Creditor is not certain if the Debtor is seeking "punitive" damages but to the
17 extent she might under 11 USC 362(k)(1), such damages can only be awarded upon a showing of
18 reckless or callous disregard for the law or rights of others. Bloom at 228. There is no evidence before
19 this Court that the Secured Creditor acted improperly when it held the foreclosure sale.
20

21 **IV. WITNESSES DISCLOSED BY SECURED CREDITOR**

- 22 1. The Debtor.
23 2. The Debtor's husband.
24 3. A knowledgeable employee of Secured Creditor.
25 4. The person most knowledgeable of this case at Frank Sorrentino's office.
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5. Any witness called by the Debtor.

V. DOCUMENTS PROPOSED BY SECURED CREDITOR

1. Secured Creditor's Motion for Relief. Docket 46
2. Payment History.
3. Order Vacating Stay. Docket 55
4. Notice of Entry of Order. Docket 57
5. Transcript from Debtor's Motion to Reinstate Automatic Stay hearing.
6. Trustees Deed Upon Sale.
7. Order on Motion to Reinstate Automatic Stay. Docket 65
8. Debtor's Motion for Sanctions and Willful Violation of the Automatic Stay and related pleadings. Docket 66- 70
9. Opposition to Motion for Sanctions and related pleadings. Docket 71-73
10. All documents produced by the Debtor.
11. Secured Creditor reserves the right to produce additional documents to rebut Debtor's allegations.

VI. CONCLUSION

The clear picture before this Court is that the Debtor, and/or her representatives prior to Mr. Burke, did not properly assert or prosecute the Debtor's interests. The law is clear that there was no stay in effect when the foreclosure sale was held and the record is completely devoid of any evidence to

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1 make a contrary ruling.

2 WHEREFORE, the Secured Creditor asks that this Court deny Debtor's requests in their entirety.

3 DATED this 4th day of January, 2010.

4 WILDE & ASSOCIATES

5  #10099
6 By /s/ Gregory L. Wilde

7 **GREGORY L. WILDE, ESQ.**

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